FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 282

MARGARETHA THOMPSON,

Petitioner,

vs.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of The Second District, State Of Illinois.

BERNARD P. REESE, JR.,
501 News Tower Building,
Rockford, Illinois,
Attorney for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	3
Statutory Provisions and Rules Conferring Jurisdiction on This Court	3
Questions Presented for Review	4
Federal Statutes, Regulations and Rules Involved	4
Statement of the Case	12
How Federal Question Raised	14
Argument	16
Conclusion	24
Appendix A— Opinion of Appellate Court	1a
Appendix B— Judgment of Appellate Court	15a
Appendix C— Order denying Petition for Leave to Appeal	17a

Citations

Air Transport Association v. Civil Aeronautics Board, 199 F. 2d 181	20
American Airlines, Inc. v. Standard Airlines, Inc., 80 F. Supp. 135, 139 (1948)	17, 19
Jones National Bank v. Yates, 240 U.S. 541, 550, 60 L. Ed. 788, 797 (1916)	23, 24
Lachs v. Fidelity & Casualty Co. of New York, 306 N.Y. 357, 118 N.E. 2d 555 (1954)	21, 22
Minneapolis St. Paul and S. Ste. M. R. Co. v. Rork, 279 U.S. 410, 73 L. Ed. 766 (1929)	24

Mosby v. Mutual Life Insurance Co. of New York, 405 Ill. 599, 607, 92 N.E. 2d 103 (1950) 22
Northern Pacific Railway Co. v. Wall, 241 U.S. 87, 91, 60 L. Ed. 905, 907 (1915) 18
Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592 (1948) 19
Paskusz v. Philadelphia Casualty Co., 213 N.Y. 22, 106 N.E. 749 (1949) 22
Personal Industrial Bankers v. Citizens Budget Co., 80 F. 2d 327, 328 (1935) 17
Satterlee v. Matthewson, 7 L. Ed. 458, 468, 2 Peters 380, 410 (1829) 23
Thompson v. Fidelity and Casualty Co., 16 Ill. App. 2d 159 (1958) 18
United States v. Union Pacific Railway Co., 91 U.S. 72, 23 L. Ed. 224 (1875) 17
Zinn v. Equitable Life Insurance Company of Iowa, 6 Wash. 2d 379, 107 P. 2d 921, 924 (1940) 22

STATUTES, RULES AND REGULATIONS

Civil Aeronautics Board, Economic Regulations:
Part 291.1 (a), (b), (c), (d) (1) & (2) 7, 8,
Part 291.2 (a) 8
Regulation Serial No. ER-136, 13 F. R. 7769 8
Rule 19, Supreme Court of the United States 2
U.S.C., Title 28, Section 1257 3
U.S.C., Title 49, Section 425(a) 4
U.S.C., Title 49, Subchapter IV, Section 481 (a) (d-1) (f) 5
U.S.C., Title 49, Subchapter IV, Section 496 (a) (b) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

MARGARETHA THOMPSON,

Petitioner,

vs.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of The Second District, State Of Illinois.

(a)

OPINIONS BELOW.

(1) The opinion of the Appellate Court of the Second District, State of Illinois, is reported at 16 Ill. App. 2d

159. The Petitioner has filed nine copies of the record as printed for the use of the Court below, as provided by Paragraph 4 of Supreme Court Rule 21, wherein the said opinion is contained and the opinion is therefore not appended hereto.

(2) Petitioner herein was denied leave to appeal to the Supreme Court of Illinois, being its No. 34839 and no written opinion was rendered by said Court in its denial of said Petition for Leave to Appeal.

(b)
JURISDICTION.

The Appellate Court of Illinois applied a Federal Statute in defining the liability of the respondent under its contract of insurance, and petitioner was entitled to its proper interpretation and correct application.

(i) The judgment of the Appellate Court of the Second District, State of Illinois, became final on March 6, 1958, by the denial of a petition for rehearing filed by petitioner herein.

(ii) The judgment of the Supreme Court of Illinois became final on May 20, 1958 by its denial of a Petition for Leave to Appeal filed by Petitioner herein.

(iii) Statutory Provisions and Rules Conferring Jurisdiction on This Court.

U. S. C., Title 28, Section 1257:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Rule 19, Supreme Court of the United States:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

(c)

QUESTIONS PRESENTED FOR REVIEW.

1. May the respondent Insurance Company use a Federal regulatory statute as the entire basis for an airline trip insurance policy without becoming subject to the Federal Court's interpretation of that statute?

2. May the respondent insurance company knowingly use technical language of a Federal regulatory statute so as to intentionally mislead an innocent purchaser?

3. May an insurance company use a technical Federal statute which it knows is the subject of much litigation and controversy so as to benefit from that controversy without having that Federal statute become a part of the contract of insurance, thus creating an ambiguity which must be construed in favor of the insured?

4. May a State Court completely ignore the case law and interpretation surrounding and given to a Federal statute by the Federal Courts and administrative agencies, when that Federal statute is the very basis of the contract of insurance in question and without said statute said policy of insurance could not exist?

(d)

The Statute, Economic Relations of the Civil Aeronautics Board and Board Regulations Serial Numbers

TITLE 49, USC, SECTION 425(a):

"The Authority (Board) is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such

general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act."

TITLE 49, USC SUBCHAPTER IV., SECTION 481 (a)(d-1)(f):

(a) "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority (Board) authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act (June 23, 1938), such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority (Board) shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein." (d-1) "The Authority (Board) shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act (§§ 401-403, 421, 422, 424-427, 451-460, 481-485, 486-496, 521-524, 551-560, 581, 582, 601-603, 621-623, 641-649, 671-681, 701-705, 711-722 of this title) and the rules, regulations, and requirements of the Authority (Board) hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

(f) "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is-

to take place without the United States, designate the terminal and intermediate points only insofar as the Authority (Board) shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority (Board), between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips, or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority (Board)."

TITLE 49, USC SUBCHAPTER IV, SECTION 496, (a)(b):

(a) "The Authority (Board) may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title (§§ 481-485, 486-496 of this title) as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority (Board) finds necessary in the public interest."

(b) "(1) The Authority (Board), from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title (§§ 481-485, 486-496 of this title) or any provision thereof, or any rule,

regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

CIVIL AERONAUTICS BOARD, ECONOMIC REGULATIONS PART 291.1 (a), (b), (c), (d) (1) & (2).

"§ 291.1 Definition—(a) Irregular air carrier. The term irregular air carrier means any air carrier which (1) directly engages in air transportation, (2) does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, and (3) does not operate or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

(b) Point. The term "point" as used in this part shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place.

(c) Agreement. The term "agreement", as used in this part, shall mean any oral or written agreement, contract, understanding, or arrangement, and any amendment, revision, modification, renewal, extension, cancellation or termination thereof.

(d) Ticket agent. The term "ticket agent" as used in this part, shall mean any person, whether such person is another air carrier or is acting as a ticket agent, travel agent, travel bureau, broker, forwarder, or otherwise (other than a bona fide regular employee of the direct air carrier concerned), who for compensation or profit:

(1) Solicits, obtains, receives, or furnishes directly or indirectly passengers or groups of passengers for transportation upon aircraft of an irregular air carrier, or

(2) Procures or arranges for air transportation of passengers or groups of passengers upon aircraft of such an air carrier by charter, lease, or any other arrangement."

PART 291.2 (a):

"§ 291.2 Classification (a) there is hereby established a classification of noncertificated air carriers to be designated as "irregular air carriers"."

THE FOLLOWING INTERPRETATION OF PART 291 WAS ADOPTED BY REGULATION SERIAL NO. ER-136, 13 F. R. 7769.

"Examples of irregular air transportation within the meaning of Part 291. For the guidance of irregular air carriers and other interested parties the Board here sets forth a number of illustrative examples of irregular and regular service. All irregular air carriers should study these examples, for the Board expects to use them as standards to apply to the operations of such carriers.

It should be noted that all of the illustrations included here refer only to actual operations. Such operations indicate a course of conduct constituting the holding out of regular or irregular service, as the case may be. The holding out of regular service may also be brought about by means other than actual operations—for example, although its services are operated irregularly, a carrier may be holding out regular service by reason of the nature and extent of its advertising and traffic

solicitation efforts. In other words, an irregular air carrier is not immune from enforcement action if its actual operations are irregular but all the circumstances surrounding its business show that the carrier is holding out regular service.

The illustrations included represent application of the principles announced in PAGE AIRWAYS, INC., INVESTIGATION, 6 CAB 1061; TRANS-MARINE AIRWAYS, INC., INVESTIGATION OF ACTIVITIES, 6 CAB 1071; and INVESTIGATION OF NONSCHEDULED SERVICES, 6 CAB 1049, and more particularly of the cease and desist order entered in the MATTER OF THE NONCERTIFIED OPERATIONS OF TRANS CARIBBEAN AIR CARGO LINES, INC., Order Serial No. E-370, adopted March 14, 1947. This is emphasized because the Board is not attempting by revision of Part 291 either to enlarge or contract *the scope of operations permitted by the regulation.*"

"(1) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
(1)	2	3	4	5	6	7
(8)	9	10	11	12	13	14
(15)	16	17	18	19	20	21
(22)	23	24	25	26	27	28
(29)	30	31				

Since these flights are conducted on the same day of each week, the service is not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional Sunday flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service."

"(2) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
....	1	(2)	3	(4)	5	6
7	8	(9)	10	(11)	12	13
14	15	(16)	17	(18)	19	20
21	22	(23)	24	(25)	26	27
28	29	(30)				

These flights are conducted regularly, twice a week, without frequent and extended definite breaks in service and are obviously not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(3) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
....	....	....	[1]	2	3	4
5	6	[7]	8	9	10	11
12	[13]	14	15	16	17	[18]
19	20	21	[22]	23	24	25
[26]	27	28	29	[30]		

These flights are conducted at regularly recurring periods, or substantially regular periods (every 4, 5 or 6 days), and therefore do not achieve infrequency and irregularity of service through frequent and extended definite breaks in service. Such service is not irregular within the meaning of Part 291.

(4) An irregular air carrier operates between points A and B in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
....	....	....	....	....	[4]	2
3	4	[5]	6	[7]	8	9
10	[11]	[12]	13	14	15	16
17	18	[19]	[20]	21	22	23
24	[25]	26	[27]	28	29	30
31						
....	1	[2]	3	[4]	5	6
7	8	9	[10]	11	12	[13]
14	15	16	17	18	19	20
21	[22]	23	24	[25]	26	27
[28]	29	30	[31]			

These flights are conducted twice a week in succeeding weeks without the intervention of other weeks or similar periods at irregular but frequent intervals during which no flights are operated. Such service is not irregular within the meaning of Part 291.

(8) Four large irregular air carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in examples (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B.

(e)

STATEMENT OF THE CASE.

The respondent issues an "airline trip" insurance policy from automatic vending machines. It had such a vending machine located at Boeing Airfield, Seattle, Washington, on November 19, 1955.

The deceased insured, Sgt. Robert J. Caruth, had purchased a ticket for an airline trip aboard a commercial aircraft operated by Peninsular Air Transport, to fly from Seattle, Washington to Chicago, Illinois. (Rec. 122, Abst. of Rec. 40). The airline trip was scheduled to leave Seattle, Washington at 6:00 P.M. on November 19, 1955.

The deceased Sgt. Caruth prior to his departure on the airline trip to Chicago, Illinois, purchased one of the "airline trip" insurance policies from the respondent's automatic vending machine located at Boeing Airfield, Seattle, Washington, the departure point for the airline trip in question.

Moments after take-off, the huge DC-4 airliner crashed in flames thereby causing the death of Sgt. Robert J. Caruth, a passenger.

The beneficiary, Margaretha Thompson, received the airline trip policy in the mail a few days later, and on November 25, 1955, notified the respondent of the insured's death.

The respondent replied by letter of November 29, 1955, stating they were not entirely sure, but they didn't think the insurance policy covered the airline trip in question. (Plt's Ex. 4, Rec. 172, Abst. of Rec. 49) Respondent stated

the premium would be returned "promptly" if it was deemed to be "in order". The premium return was finally offered approximately one month later, but not accepted by the petitioner.

Respondent refused to pay the policy on the grounds that the airline trip in question, was not that of a "scheduled air carrier" under the definition of the policy, as the air carrier, Peninsular Air Transport, was licensed as an "irregular air carrier" by the Civil Aeronautics Board.

Petitioner brought suit on a complaint alleging in the alternative, as permitted by Section 43, Chapter 110, Illinois Revised Statutes, 1955, that the flight in question was scheduled within the terms of the policy, or that respondent had waived its right to assert its technical definition of "scheduled".

Respondent denied this in its answer, and set out the definition of "scheduled air carrier" as defined in the Federal statutes. To this petitioner filed a reply. The case came on for trial. During the trial the trial court was adamant that the policy covered the airline trip in question and said he would direct a verdict in favor of petitioner. The trial court, however, would not let petitioner put in any evidence on the question of waiver and estoppel, saying if he had made a mistake, the upper court would correct it. (Rec. 136, Abstr. of Rec. 36)

Judgment of $25,000.00 was entered for petitioner on a directed verdict. The Appellate Court reversed without remanding despite petitioner's insistence that she should be allowed to put in evidence on waiver and estoppel. The Supreme Court of Illinois refused to hear the question.

HOW FEDERAL QUESTION RAISED.

The Petitioner in its complaint alleged the aircraft in question, on which the deceased Sgt. Robert J. Caruth embarked on an airline trip from Seattle, Washington, to Chicago, Illinois, and for which airline trip the deceased sought to insure himself, was in fact *scheduled* for a definite time and was a definitely scheduled airline trip between named commercial airfields and therefore a "scheduled aircarrier" within the terms of the policy. The respondent in its motion to strike, as well as in its answer denied this and set out paragraph 5 of the policy which purports to restrict the usual use, sense and definition of "scheduled" to that *technical* definition of the word "scheduled" as used by the Civil Aeronautics Board. All other aircraft according to respondent, "recognized, designated, licensed, or determined by the governmental authority having jurisdiction over civil aviation as being irregular or non-scheduled air carriers" are excluded from coverage under the policy. In support of this, the Respondent offered, and it was admitted into evidence, Title 49, U.S.C., Section 481 (a) (b); Title 49, U.S.C., Section 496 (a) (b); Civil Aeronautics Board Economic Regulations Part 291.1 and 291.2(a); together with Board Regulation "Serial Numbers" which explain and form a part of said economic regulations. The trial court, however, entered judgment for the Petitioner on simple, non-federal contractual grounds saying in effect the layman's definition of "scheduled" airline trip should apply and that the technical definition of the Federal statute could not apply so as to defeat the Petitioner's recovery. The federal issue was framed, however, and the Appellate Court of Illinois, 2nd District, reversed the trial court on the basis of the

Federal statute in which the policy of insurance in question is actually predicted and issued, and said that without a doubt the technical definition of the statute should apply. The Appellate Court therefore reversed the trial court and denied recovery to the Petitioner *because of the Federal statute, and based on a haphazard and erroneous interpretation of the terms of the Federal statute in question*, which is not in accord with the Federal court's interpretation of that statute.

As a result, *because of the Respondent's misuse of a Federal statute in issuing its policy of insurance, and the 2nd District Appellate Court of Illinois' misguided interpretation of that Federal statute*, and the Supreme Court of Illinois' refusal to further hear the issue by a denial of the Petitioner's petition for leave to appeal which was filed pursuant to Section 75, Chapter 110, Illinois Revised Statutes, 1957, the Petitioner has been deprived of $25,000.00, and interest which rightfully belongs to her under the contract of insurance.

ARGUMENT.

A.

Normally, an insurance policy does not involve a Federal question. The instant case, however, presents a rather novel and unusual situation.

With the growth of the air industry following World War I, Congress passed the Civil Aeronautics Act of 1938 for the purpose of regulating air travel for the protection of the general public. The Board of Civil Aeronautics (hereinafter referred to as "Board") was authorized by Title 49, U.S.C. Sec. 425 (a) to promulgate such rules as it deemed necessary to effectuate the Act. Title 49, U.S.C. Sec. 481, 496 (a) provided for licensing and classification of air carriers for the "*purpose of this Act*".

The Fidelity & Casualty Co. of New York, respondent herein, has attempted to convert the air carrier classifications established by the Board to their own private use in insurance contracts, a purpose for which Congress never intended the classification to be used and a purpose for which they are not adaptable.

The Board issued Economic Regulations Part 291.1 (a) (b) (c) (d-1) (d-2) and Part 291.2 together with explanatory Regulation Serial No. ER-136, 13 F.R. 7769, all of which are set out in this Petition. There was thus established *for purpose of Federal government regulation* different classifications of aircraft as well as elaborate technical data explaining how a particular classification was to be determined. Said classifications included "Scheduled Air Carriers" and "Irregular Air Carriers". A different kind of license was issued to each classification and that

license recorded in Washington, D. C. Much litigation developed and still continues involving the question of "when is an 'irregular air carrier' violating its license so as to be imitating a 'scheduled air carrier'?" The Federal courts have recognized the highly technical nature of the question and as in *American Airlines, Inc.* v. *Standard Airlines, Inc.*, 80 Fed. Supp. 135, 139 (1948) the Court said the question was so *highly technical*, only the Board had the technical knowledge to determine the answer.

Into this technical abyss strode the Fidelity & Casualty Company of New York, Respondents and issued an "airline trip" policy based solely on the aforesaid technical classification of "scheduled air carriers". The policy was not sold by a living salesman, but by an automatic vending machine. The respondent knew the difficulty involved in determining between the classifications established by the Board, and knew they could thereby capitalize upon such confusion by issuing the so-called "Airline trip" policy in question, entitling it "Airline Trip Insurance", stating that only "scheduled" air carriers were covered. As a result, the respondent has accepted in the past, as it did in the instant case, *premiums for which it never intended to render a benefit, and will continue to accept such premiums in the future without the intent to render a benefit.*

Since the insurance policy in question is based entirely upon and defined in the light of a Federal statute, the statute becomes a part of the contract and must be included as though expressly incorporated therein. This means not only the statute itself, *but the interpretation of that statute as statutes are construed.*

Citing the case of *United States* v. *Union Pacific Railway Co.*, 91 U.S. 72, 23 L. Ed. 224, the Court said in *Per-*

sonal Industrial Bankers v. *Citizens Budget Co.*, 80 F. 2d 327, 328 (1935):

> "We recognize that in construing a contract which rests upon statute, the statute must be read into the Contract, and that rules for construing statutes are not those which apply to the construction of contracts."

In the case of *Northern Pacific Railway Company* v. *Wall*, 241 U.S. 87, 91, 60 L. Ed. 905, 907 (1915), the Court said in holding that a bill of lading issued under a statute should be interpreted in light of the statute:

> "As this Court has often held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

What the respondent has thus done, is to put the purchaser of the "airline trip" policy in a position where he must *unknowingly* interpret the technical Federal statute creating the classification of air carriers. The Appellate Court of Illinois says this is a simple matter that anyone should readily be able to determine. The Illinois Appellate Court says at page 170 of its opinion (*Thompson* v. *Fidelity and Casualty Co.*, 16 Ill. App. 2d 159) with reference to "scheduled":

> "This term has a clear and concise meaning and when defined by any standard it simply denotes an air carrier which operates and holds itself out to the public that it does operate aircraft *between designated points regularly, or with a reasonable degree of regularity*, pursuant to a schedule previously announced." (Emphasis ours)

The opinion and decision of the Illinois Appellate Court, however, is emphatically not in accord with the Board's view of the interpretation (See the lengthy Regulation

Serial No. ER-136, 13 FR. 7769 promulgated by the board, pg. 7 herein), and is not in accord with a single recorded opinion of the Federal Courts on the subject. For example, in *American Airlines, Inc.* v. *Standard Airlines, Inc.*, 80 F. Supp. 135, 139 (1948) the Court said about the identical definition used by the Illinois Appellate Court:

> "What constitutes the operation of air flights '*regularly or with a reasonable degree of regularity*', and what constitutes service of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation is not defined in the Economic Regulation of the Act; the definition was wisely left flexible because as the Regulation and the Explanatory Statement promulgated by the Board in connection therewith show, *what would constitute 'regularity' or 'a uniform pattern of normal consistency of operation' might vary with time, place, nature of flights and circumstances.* Irrespective of the simplicity or complexity of the question in this particular case, *it is evident that the question is of a kind that can be a highly technical one, calling for expert knowledge of the industry*, and that the Board, which phrased and promulgated the Regulation, and with which operational reports of all irregular air carriers are regularly filed, 'so that it may maintain adequate supervision * * * with respect to exempted operation', is much better equipped and qualified to determine it than the Court could possibly be." (Emphasis supplied).

In *Pacific Northern Airlines* v. *Alaska Airlines*, 80 F. Supp. 592 (1948) the Court said at page 608 of a very lengthy and involved decision that while the general tenor and body of evidence "indicated the defendant did not advertise or expressly claim" that it operated a scheduled service between Anchorage, Alaska, and Seattle, Washington, "*yet in view of all the circumstances that conclusion seems unsound.*"

To indicate how completely devious and uncertain can be the definition of what is, and what is not, a "scheduled" air carrier, or one purporting to operate regularly, attention is directed to *Air Transport Association* v. *Civil Aeronautics Board*, 199 F. 2d 181. The case involved the transportation of persons and freight between Seattle, Washington and Alaska. One of the airfields involved, incidentally, was the airfield in question, Boeing Airfield, Seattle, Washington. The airline in question was held to be violating its license of operation as an irregular air carrier by holding itself out through a ticket agency as operating a regular schedule. The Court said the principal was responsible for the representations of its agent, the ticket agency, and the airline's license was suspended.

Even the facts upon which the Appellate Court of Illinois based its erroneous decision were insufficient in light of the foregoing Federal cases on the subject, and *particularly since petitioner was not allowed to put in any evidence on that issue.*

The crux of the matter is that by the decision of the Appellate Court of Illinois, and denial of leave to appeal by the Supreme Court of Illinois, the respondent is allowed to issue an "airline trip" policy based on a Federal statute, and is acknowledged the right to do so based upon the classification of "scheduled air carrier" and "irregular air carrier" as used in the Federal statute. The Court has ignored, however, the intended use of the terms "scheduled" and "irregular" by the Federal legislature, and their extremely technical application. The Illinois Court has thus failed to follow Federal law on the subject, and has used the term "scheduled" in a vacuum. As a result, the Illinois court has not incorporated the entire Federal statute and its interpretation into the con-

tract of insurance as required by law so to do. They should have done so as previously stated. The policy of insurance becomes grossly ambiguous when the correct interpretation of the Federal statute is applied, and the policy should be construed in favor of the petitioner and the judgment of the Trial Court affirmed.

The term "scheduled" as used in the policy has *two meanings*. One a *technical meaning* created by the Federal statute, and another the layman's definition of "scheduled", meaning pre-arranged time. The Illinois Court says there are not two meanings for the term, and that the term "scheduled" as used in the policy and the Federal statute is not technical. To so hold is not just or logical, or in accord with Federal decrees and decisions. It ignores the problem a purchaser has of realizing there are two meanings for "scheduled" and ignores the problem of separating the "real" from the imitation under the Federal statute, thus ignoring the entire *practical* aspect of the situation. For example, you go into a commercial ticket agency and buy a ticket for an airline trip from Chicago, Illinois to Washington, D. C., aboard a DC 4 of Illini Airlines, Inc., leaving Chicago at 7:00 A.M. Without further information, is your airline trip being made on a "scheduled air carrier"?

The Federal statutes in question together with their interpretation should be incorporated in the insurance policy in question. As a result, the policy becomes highly technical and ambiguous. This fact was recognized in *Lachs* v. *Fidelity & Casualty Co. of New York*, 306 N.Y. 357, 118 N.E. 2d 555 (1954). There the highest court of New York *held essentially this same policy issued by this same respondent* to be ambiguous. The majority opinion in that case is the position of the petitioner here exactly as to the ambiguity of the policy in question, particularly in

view of the way the policy is issued from an automatic vending machine, the subtle use by the respondent of the term "airline trip", *and the fact that the respondent intended to keep the premium paid by the decedent had he arrived safely.* The New York Court said in the *Lachs* case at page 559 of 118 N.E. (2d) 555 (1954);

> "Decedent was invited to purchase 'Airline Trip Insurance'; she applied for 'Airline Trip Insurance'; on the envelope to carry the policy to her daughter, beneficiary, was 'Airline Trip Insurance' but defendant says that was not what decedent purchased. Shall the defendant which wrote the policy be permitted to say that 'Airline Trip Insurance' 'means just what I choose it to mean' and therefore a flight of a 'non-scheduled' airline is not covered by the policy."

The eminent Justice J. Cardoza said in *Paskusz* v. *Philadelphia Casualty Co.*, 213 N.Y. 22, 106 N.E. 749 (1949) that insurance policies should not be:

> "couched in language as to the construction of which lawyers and courts may honestly differ."

In *Zinn* v. *Equitable Life Insurance Company of Iowa*, 6 Wash. 2d 379, 107 P. 2d 921, 924 (1940) it was said:

> "The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense."

To the same effect is *Mosby* v. *Mutual Life Insurance Company of New York*, 405 Ill. 599, 607, 92 N.E. 2d 103 (1950).

B.

The fact that the Petitioner at the outset of this case did not base its claim on the Federal statute or that the trial court ruled in the Petitioner's favor on non-federal grounds does not effect this Court's right to jurisdiction if it desires to exercise jurisdiction. *Jones National Bank v. Yates*, 240 U.S. 541, 550, 60 L. Ed. 788, 797, (1915) is a case similar to the instant case so far as logic and basic reasoning are concerned. The plaintiff had sued the defendant bank for damages for false representation of the bank's financial condition. The bank defended on the grounds that a Federal statute defined the liability as "knowingly." Judgment for plaintiff was reversed in the State Supreme Court on the pleadings based on the Federal statutes use of the word "knowingly". The plaintiff in error petitioned for a writ of error to the United States Supreme Court. Mr. Justice Hughes said in delivering the opinion of the Court:

> "It is insisted that the writs should be dismissed in the view that the plaintiff in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendant in error. But this objection ignores the nature of the plaintiff's case. The fact that their petition did not refer, in terms, to the Federal statute, is not controlling."

Also:

> "The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions."

In *Satterlee v. Matthewson*, 7 L. Ed. 458, 2 Peters 380, 410 (1829):

> "It has also been settled that in order to give jurisdiction to this Court under the 25th Section of

> the Judiciary Act (2d Vol. Laws U.S. 65) it is not necessary that the record should state in terms that an act of Congress was in point of fact drawn in question. It is sufficient, if it appears from the record that an act of Congress was applicable to the case, and was misconstrued. * * * ."

In the event this Court grants Certiorari, the Writ should be directed to the Appellate Court of Illinois, 2nd District, State of Illinois, because of Section 75, Chapter 110, Illinois Revised Statutes, 1957. See *Minneapolis St. Paul and S. Ste. M. R. Co.* v. *Rork*, 279 U.S. 410, 73 L. Ed. 766.

CONCLUSION.

We say the Appellate Court of Illinois denied liability on an improper interpretation of the Federal statute with which the Supreme Court of Illinois agreed, and that the entire decision rests on a *proper* interpretation thereof. The Petitioner should not be deprived of her judgment in the trial court because of the improper applications of the Federal statute, and then be denied admission to this Court because the case was treated as being of a different character. In *Jones National Bank* v. *Yates*, 240 U.S. 541, 551, 60 L. Ed. 788, 797 (1915) Justice Hughes said:

> "If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction."

From a reading of the Civil Aeronautics Act together with the rules and regulations thereof and cases thereon, it is apparent the Act is far too technical to be made the subject and basis of an insurance policy; particularly as issued here from an automatic vending machine, wherein *the purchaser must unknowingly interpret the Civil Aeronautics Code.* As a result, the policy is technical and ambiguous, and should be construed in favor of the petitioner insured, and against the one who drew it.

We respectfully pray that the Writ for Certiorari be issued because of the reasons given and the extensive use of insurance and air travel in our society today. The decision of the Appellate Court of Illinois should be reversed, and the decision of the trial court reinstated.

Respectfully submitted,

BERNARD P. REESE, JR.,
501 News Tower Building,
Rockford, Illinois,
Attorney for Petitioner.

APPENDIX A

Opinion of the Appellate Court of Illinois.

WRIGHT—J.

This is an appeal by the defendant from a judgment entered by the Circuit Court of Winnebago County in the sum of $25,000.00 in favor of the plaintiff. The case was tried before a jury and at the conclusion of all of the evidence, the court directed a verdict in favor of the plaintiff in the sum of $25,000.00 and entered judgment upon the verdict.

The facts as alleged in plaintiff's complaint, briefly summarized, in substance are as follows: First, that the plaintiff, Margaretha Thompson, was the beneficiary under two policies of insurance issued by the defendant, Fidelity And Casualty Company of New York, in the sums of $18,750.00 and $6,250.00 respectively. Second, that on November 17, 1955, Robert J. Caruth, at that time the husband of the plaintiff, purchased the two policies of insurance from a vending machine at the Boeing Air Field, Seattle, Washington, immediately prior to embarking on a plane operated by Peninsular Air Transport Company scheduled to leave at 8:00 o'clock P.M. Third, that the said Robert J. Caruth purchased a ticket for an air line trip which was scheduled to leave Boeing Field at 8:00 o'clock P.M., but which was delayed until 12:00 o'clock midnight of November 17, 1955. Fourth, that by the terms of said insurance policies, the defendant contracted to pay to the beneficiary the sum of $25,000.00 in the event of the death of Robert J. Caruth while engaged in and as a result of the air trip covered by the air line ticket. Fifth, that the

said aircraft did in fact take off from Boeing Field at or about 12:00 o'clock midnight on said date with Robert J. Caruth as a passenger. Sixth, that the said aircraft crashed on take off and as a result thereof Robert J. Caruth was killed, and that plaintiff made proper demand but defendant refused to pay the sum of $25,000.00.

The answer, as amended, filed by the defendant admitted: First, that Robert J. Caruth was a passenger on the Peninsular Aircraft which took off from Boeing Field at about midnight November 17, 1955, and that said aircraft crashed and caused his death. Second, that the beneficiary gave proper notice and that the defendant refused to pay. Concerning the allegation that the defendant contracted to pay the beneficiary $25,000.00 in the event of the death of Robert J. Caruth, defendant averred that it did not so contract; but on the contrary, the insuring clause of the policies limited coverage to a trip taken by the insured "after the purchase of this policy on Aircraft Operated by a Scheduled Air Carrier as defined" in the policies and that the definition of an aircraft operated by a scheduled air carrier did not include, and specifically excluded, aircraft operated by Peninsular Air Transport.

Plaintiff filed a reply to this answer denying that Peninsular Air Transport Company was not a scheduled air carrier and denying that Peninsular Air Transport was recognized, designated and determined, as an irregular or non-scheduled air carrier. The pleadings set out above presented the essential issues decided by the trial court which are now before this Court for review.

Most of the facts were either admitted in the pleadings, stipulated during the trial, or established by uncontroverted evidence. The evidence reveals that on November

17, 1955, Robert J. Caruth was at the Boeing Air Field in Seattle, Washington. There he purchased, through a vending machine, two insurance policies in the amounts heretofore stated, one at 3:42 o'clock P.M. and the other at 3:47 o'clock P.M. That, thereafter, the said Robert J. Caruth purchased a ticket for an air trip, which was sold to him through an agency, and boarded a DC-4 aircraft operated by Peninsular Air Transport Co., which aircraft took off from Boeing Field about seven miles south of Seattle, at around midnight, crashing on take-off and killing Caruth. Peninsular Air Transport Company was in November of 1955, at the time of the occurrence in question, a partnership owned by William Roy Robinson and Howard Bert Robinson, having its principal operation and maintenance base at Miami (Fla.) Air Transport, Hangar No. 1. It operated four aircraft and operated them under a Letter of Registration from the Civil Aeronautics Board and an Operating Certificate from the Civil Aeronautics Administration under Part 42 of the Civil Air Regulations. Peninsular Air Transport Company did not maintain scheduled flights, file schedules and tariffs for any regular passenger service, nor hold itself out as maintaining any regular schedule of flights.

The aircraft in question left Miami on November 13th, 1955, and flew without passengers to Richmond, Virginia. It then flew to Tacoma, Washington, under a Military "CAM" Flight. From that point it proceeded without passengers from Tacoma to Boeing Field, Seattle, Washington, arriving on November 14th, 1955. The aircraft was not at the time of the crash, owned, operated or chartered by the United States Government. When the aircraft arrived at Boeing there were no flights for it. It left Boeing Field on November 17, 1955, on a flight that

was composed of 100% military troops, which, however were individually ticketed passengers. On this fatal flight that left Seattle on November 17th, the passengers might have been under orders, might have been on furloughs, or might have been enroute for any number of reasons. A prospective passenger on this type of flight is given an agency ticket, which is exchanged for a carrier ticket. [Peninsular Air Transport sold all of its tickets through agencies. Sometimes these tickets stated the hour of departure and sometimes they did not.] If an agency was unable to sell sufficient tickets to make a pay load, Peninsular was not obligated to take off and had the prerogative of cancelling the flight. William Roy Robinson, one of the partners of Peninsular Air Transport Co., testified that he believed there was something on the carrier ticket which stated that it was not a scheduled carrier and to his knowledge this was true of Peninsular Air Transport. The evidence is conflicting as to the exact time set for take off. The specific time set for take off was delayed because of weather. However, the aircraft did in fact take off shortly before midnight. An irregular air carrier sometimes gets only a few hours' notice of a flight. On the date of the crash, Peninsular had no regularly scheduled flights from Boeing Field to any other point in the United States. The routes flown by Peninsular are not exactly the same as those flown by scheduled air lines.

It is the defendant's theory that the only issue involved in this case is whether the insured was a passenger on an aircraft operated by a "scheduled air carrier" as defined in the policy. Further, it is urged by the defendant that the undisputed evidence shows that the insured was not a passenger on an aircraft operated by a scheduled air carrier, and the trial court should have directed a verdict for the defendant.

(Opinion)

For a determination of this cause, we quote below the portions of this policy pertinent to the issues.

It commences with the following words printed in capitals and in type roughly twice the size of the ordinary type in the body of this policy:

> "DO NOT PURCHASE MORE THAN A TOTAL OF $62,500 PRINCIPAL SUM—NOR FOR TRAVEL ON OTHER THAN SCHEDULED AIR CARRIERS. * * *"

The next sentence reads:

> "I hereby apply to Company named below for Scheduled Air Carrier Trip (Airline Trip) Insurance * * *"

The next pertinent provision is:

> "2. INSURING CLAUSE: Ticket or Pass Requirement. The Company will pay the benefits specified below if * * * the Insured suffers loss * * * sustained under circumstances specified below * * * after the purchase of this policy on Aircraft Operated by a Scheduled Air Carrier as defined below * * * provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip issued to him for transportation on an aircraft operated by a scheduled air carrier."

There follows this paragraph, the first clause of which is printed in bold face capitals and in type double the ordinary type:

> "6. DEFINITION OF AIRCRAFT OPERATED BY A SCHEDULED AIR CARRIER. The words 'Aircraft Operated by a Scheduled Air Carrier' as used in this policy, mean and are defined as follows: (1) aircraft of United States registry, operated on a regular, special or chartered flight by a scheduled air

carrier holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of America, or its successor, and which in accordance therewith files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities at regular and specified times, or (2) aircraft of foreign registry operated on a regular, special or chartered flight by a scheduled air carrier holding a certificate, license or similar authorization for scheduled air carrier transportation by the country of the aircraft's registry, and which in accordance therewith files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities at regular and specified times, or (3) aircraft of United States registry operated on a regular scheduled flight solely within the boundaries of a State of the United States by a scheduled air carrier legally authorized to conduct such operation, and which files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities solely within the boundaries of such State at regular and specified times. Specifically excluded from the above definition of 'Aircraft Operated by a Scheduled Air Carrier' are any and all aircraft operated by scheduled military airlines and any and all aircraft operated by air carriers recognized, designated, licensed or determined by the governmental authority having jurisdiction over civil aviation as being irregular or non-scheduled air carriers."

Between the Insuring clause and the above Definition clause, all appearing on the first page of the policy, is the following clause:

"5. DEFINITION AND DELIMITATION OF COVERAGE. This policy applies only to such injury . . . (a) while boarding, riding as a passenger in, alighting from or coming in contact with an aircraft operated by a scheduled air carrier as defined below:

(Opinion)

or (b) while riding in or on a land conveyance provided or arranged for * * * by such scheduled air carrier * * *; or (d) in consequence of exposure as the result of a forced landing of, accident to, or disappearance of aircraft operated by a scheduled air carrier * * *."

Although the law of the State of Washington applies to the case at bar, the plaintiff and defendant both agree that it does not differ materially from the law of Illinois concerning the reasons governing interpretation and construction of insurance contracts and contracts in general. This is so agreed to by counsel in their respective briefs and both cite principally Illinois authorities and authorities from other jurisdictions.

The rule of liberal construction of insurance policies in favor of the insured must yield to rules of reasonable construction, and the rule construing ambiguous provisions strictly against the insurer will not permit perversion of plain language to create an ambiguity where none in fact exists. This rule was recognized recently by this court in *Maryland Casualty Company* v. *Holmsgaard*, 10 Ill. App. 2d., 1, 8, 10, 133 N.E. 2d. 910, 913, 914, wherein it was stated:

"* * * Policies should be construed according to the sense and meaning of the terms used and if the language is clear and unambiguous it must be taken in its plain, ordinary and popular sense. (Cases Cited)

"* * * The rule that ambiguous language is to be construed most strongly against the insurer does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exist. (Case Cited)"

We have reviewed the policy in this case and find that it contains no inconsistencies or ambiguities. The policy itself is legible, simply worded and is contained on one

(Opinion)

sheet of 8½" by 11" paper. The policy in its simplest terms agrees, in consideration of a definite premium, to pay certain benefits for certain losses sustained on an aircraft operated by a scheduled air carrier. Provided further, that at the time the insured sustains such injury or loss he is traveling on a transportation ticket covering the whole of said air line trip issued to him for transportation on an aircraft operated by a scheduled air carrier. The definition of an "aircraft operated by a scheduled air carrier", is set out in paragraph six of the policy quoted above. (This definition contains no inconsistencies and is not ambiguous.)

The construction of the provisions of the policy is for the court and what is meant by the term "scheduled air carrier" is a question of law, but whether the airplane was in fact a "scheduled air carrier" within the meaning of the policy is a question of fact. *Home Insurance Company of New York* v. *Mendenhall*, 164 Ill. 458, 45 N.E. 1078; *Yates* v. *Bankers Life and Casualty Company*, 415 Ill. 16, 111 N.E. 2d. 516; *Goldstein* v. *Metropolitan Life Insurance Company*, 324 Ill. App. 168, 57 N.E. 2d. 645.

In the case of *Lachs* v. *Fidelity And Casualty Company of New York*, 306 N.Y. 357, 118 N.E. 2d. 555, a situation involving a scheduled air carrier was before the court.

In the *Lachs* case, *supra*, the defendant filed a motion for a summary judgment supporting its motion with affidavits. The plaintiff filed counter-affidavits, the motion for summary judgment was denied by the trial court, which order was affirmed by the Appellate Division and appealed by permission to the Circuit Court of Appeals. The clause for interpretation in the *Lachs* case was "civilian scheduled air lines" as contrasted with the term in the instant case "scheduled air carrier". The majority opinion in the

Lachs case held that under the New York summary judgment procedure and the sharp conflict of facts there presented, a question of fact for determination by a jury existed. The court at page 559 of 118 N.E. 2d. said:

> "Plaintiff claims that Miami Airline, Inc., maintained regular, published schedules of fares and schedules showing passenger mile rates and that it held itself out as maintaining regular schedules of flights and tickets were sold for stated hours of departure and that it was licensed by the Civil Aeronautics Board to carry passengers and freight with large aircraft in interstate, overseas and foreign air transportation. We think there is a question of fact presented."

There is no such contention by the plaintiff in the instant case and there are no conflict of facts in the instant case such as existed in the *Lachs* case.

Plaintiff's complaint does not allege, nor does plaintiff contend that Robert J. Caruth was a passenger at the time of his death on an aircraft operated by a "scheduled air carrier", but alleges that he was on a plane "scheduled" to leave at 8:00 o'clock P.M. Plaintiff's theory is that since the plane was to leave at a prearranged time, it was scheduled within the meaning of the policy. Plaintiff contends that the term schedule in the policy has reference to the time and gives examples, such as: "a talk is scheduled", "we were scheduled to leave", "the attack was scheduled", "the parade is scheduled." We cannot agree with plaintiff's theory or argument. A prearrainged time can be set for any type of airplane to take off, such as a private plane, a navy plane, an army plane or even today an aircraft to outer space or the moon. However, such prearranged time for take off does not make it a "scheduled air carrier" within the meaning of the policy before us.

(Opinion)

The definition of "an aircraft operated by a scheduled air carrier" is set out in paragraph 6 of the policy, *supra*. Three different types of aircraft are defined as being a scheduled air carrier. Definition number (1) states:

> "Aircraft of United States registry, operated on a regular, special or chartered flight by a scheduled air carrier holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of America, or its successor, and which in accordance therewith files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities at regular and specified times."

Definition numbers (2) and (3) are not here in question.

There is nothing ambiguous about the term scheduled air carrier. This term has a clear and concise meaning and when defined by any standard it simply denotes an air carrier which operates and holds itself out to the public that it does operate aircraft between designated points regularly, or with a reasonable degree of regularity, pursuant to a schedule previously announced. We are not unmindful of the fact that words have different meanings and different significations to different people on different occasions or under various and different circumstances, but we cannot perceive how the term scheduled air carrier can have other than one meaning: that being an air carrier which operates aircraft between designated points regularly in accordance with previously announced schedules.

The minority opinion in the *Lachs* case lent itself to a full, comprehensive and well written opinion concerning the interpretation of scheduled and non-scheduled airlines. At page 560 of 118 N.E. 2d, it was aptly stated in the minority opinion:

> "In Alice's Wonderland, a Word, said Humpty Dumpty, 'means just what I choose it to mean'. But,

in a jurisdiction more mundane, I do not perceive how we may say that the word 'scheduled' can mean 'non-scheduled,' nor do I see how we may tell a jury that it can say that an insurance policy which in express terms applies 'only' to 'scheduled airlines' can cover flights by an airline listed and self-described as 'non-scheduled'."

There is no evidence in the record that Peninsular Air Transport Company was a scheduled air carrier holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States, and which in accordance therewith files, prints, maintains and publishes schedules and tariffs for regular passenger service between named cities at regular and specified times. In fact, the evidence is without conflict that Peninsular was a non-scheduled air carrier. William Roy Robinson, a witness for the defendant, testified that he and his brother were partners and the partnership operated the Peninsular Air Transport Company with four aircraft operating under a Letter of Registration from the Civil Aeronautics Board and an Operating Permit from the Civil Aeronautics Administration, under Part 42 of the Civil Air Regulations. The Letter of Registration and Operating Certificate were for the specified type of air transportation commonly referred to as a "non-scheduled carrier." Under this Certificate, Peninsular Air Transport did not maintain scheduled flights nor did it file any schedules or tariffs for any regular passenger service with the Civil Aeronautics Authority, nor did it in November of 1955 advertise or hold itself out as maintaining any regular schedule of flights. This witness further testified that when the aircraft arrived at Boeing Field there were no flights for it. He had no particular flights in mind for it and it remained in Seattle three or four days. Mr. Robinson further testified that as an irregular air carrier operator, he

sometimes only got a few hours' notice that he was going to have a flight. Sometimes the bids are awarded the day prior to flight. He further stated, that if after arriving at Boeing on November 14th an agency would be able to make up a flight from there to Laredo, Texas, he would have flown that route. Peninsular Air Transport sold no tickets itself, all being sold through agencies. (When these tickets are sold they sometimes stated the hour of departure and sometimes did not.)

At the conclusion of all the evidence both plaintiff and defendant presented motions for a directed verdict. The court directed a verdict in favor of the plaintiff and denied defendant's motion. Where a motion to direct a verdict is made at the close of all the evidence, all of the evidence on both sides is to be considered, *Dixon* v. *Smith-Wallace Shoe Co.*, 238 Ill. 234, 119 N.E. 265, the question being whether all of the evidence for both parties makes out a case, *Funkhouser* v. *Illinois Bankers Life Association*, 237 Ill. App. 95.

It is not only the power but also the duty of the court to direct a verdict for plaintiff at the close of all the evidence when he has made out a case and no evidence tending to contradict it is offered, *Marshall* v. *John Grosse Clothing Co.*, 18 Ill. 421, 56 N.E. 807, or no evidence has been produced by defendant that in any way constitutes a defense, *Independent Oil Men's Association* v. *Fort Dearborn National Bank*, 311 Ill. 278, 142 N.E. 458. In the case before us the plaintiff has failed absolutely to make out a case and there is a complete absence in the record of any evidence fairly tending to prove all of the necessary elements of the plaintiff's case. Therefore, the court erred in granting plaintiff's motion for a directed verdict at the close of all the evidence.

(Opinion)

The question of law presented to the court upon defendant's motion for a directed verdict at the close of all the evidence is whether, when all of the evidence is considered, together with all reasonable inferences from it in its most favorable aspect to the plaintiff, there is a total failure to prove a necessary element of the plaintiff's case. *Nelson* v. *Stutz Chicago Factory Branch, Inc.*, 341 Ill. 387, 173 N.E. 394. We conclude that there was no evidence in this case tending to prove the necessary element of the plaintiff's case that Caruth at the time of his death was a passenger on an aircraft operated by a scheduled air carrier as defined in the policy.

Where evidence of an affirmative defense is offered, as in this case, it is proper to direct a verdict for the defendant at the close of all the evidence. *Wallner* v. *Chicago Consolidated Traction Co.*, 245 Ill. 148, 91 N.E. 1053.

The record before us is void of any evidence placing the insured under the terms of the policy. On the contrary, the affirmative defense interposed by the defendant that the insured was not a passenger on an aircraft operated by a scheduled air carrier at the time of his death was established by uncontradicted evidence. That being the case, the lower court should have directed a verdict for the defendant.

The judgment of the Circuit Court of Winnebago County is reversed.

JUDGMENT REVERSED

Crow, P. J. And Solfisburg, J., Concur.

APPENDIX B.

Judgment of Appellate Court of Illinois.

UNITED STATES OF AMERICA

State of Illinois
Appellate Court
Second District—ss:

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 1st day of October, in the year of our Lord one thousand nine hundred and fifty-seven, within and for the Second District of Illinois.

SECOND DIVISION.

Present—Honorable DeWitt S. Crow, Presiding Justice
Honorable Clarence S. Wright, Justice
Honorable Roy J. Solfisburg, Jr., Justice
Paul V. Wunder, Clerk
Frances M. Lambert, Sheriff

Be it remembered, That, to wit: On the 24th day of January, A.D. 1958, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz.:

No. 11071
Margaretha Thompson,
Appellee,
vs.
Fidelity and Casualty Company of New York,
a corporation,
Appellant.

Appeal from the Circuit Court of Winnebago County.

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered and ordered by the Court that, for that error, and others in the record and proceedings aforesaid, the judgment of the Circuit Court of Winnebago County in this behalf rendered, be reversed.

And it is further considered and ordered by the Court that the said appellant recover of and from the said appellee, its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

State of Illinois,
Appellate Court,
Second District—ss.

I, Paul V. Wunder, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true full and complete copy of the Final Order of the said Appellate Court in the above entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 18th day of August in the year of our Lord one thousand nine hundred and fifty-eight.

/s/ Paul V. Wunder
Clerk of the Appellate Court

(Seal)

APPENDIX C.

Order Denying Petition for Leave to Appeal.

UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss.

At a term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of May in the year of our Lord, one thousand nine hundred and fifty-eight, within and for the State of Illinois.

Present Charles H. Davis, Chief Justice

Justice Joseph E. Daily — Justice Walter V. Schaefer
Justice George W. Bristow — Justice Harry B. Hershey
Justice Ray I. Klingbiel — Justice Byron O. House

Latham Castle, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Rememberd, that, to-wit: on the 20th day of May, 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 34839

Margaretha Thompson,

Petitioner,

vs.

Fidelity and Casualty Company of New York, a corporation,

Respondent.

Petition for Leave to Appeal from Appellate Court
Second District 66555 11071

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Mrs. Earle Benjamin Searey, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 26th day of May, 1958.

(Seal)

/s/ Mrs. Earle Benjamin Searey
Clerk,
Supreme Court of the State of Illinois.